| | |
|---|---|
| District Court, Larimer County, State of Colorado<br>201 LaPorte Avenue, Suite 100<br>Fort Collins, CO 80521-2761<br>(970) 494-3500 | DATE FILED: August 12, 2019<br>CASE NUMBER: 2018CV30371 |
| Thompson Area Against Stroh Quarry, Inc., a Colorado nonprofit corporation, Dani Korkegi, an individual, Gregory Martino, an individual, Monique Griffin, an individual, Cristi Baldino, an individual, Victoria Good, an individual, and Arlene Libby, an individual,<br><br>**Plaintiffs,**<br><br>v.<br><br>The Board of County Commissioners of Larimer County, Colorado (including Commissioner Lew Gaiter and Commissioner Tom Donnelly, in their official capacities), the governing body of a political subdivision of the state of Colorado and Coulson Excavating Company, Inc., a Colorado corporation,<br><br>**Defendants.** | ▲ **COURT USE ONLY** ▲<br><br>Case Number: **2018CV30371**<br><br>Courtroom: **3B** |

**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN-PART AND DENYING IN-PART DEFENDANT BOARD'S MOTION FOR SUMMARY JUDGEMENT AND DENYING DEFENDANT COULSON'S MOTION FOR SUMMARY JUDGMENT**

> Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause.

*Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009).

Plaintiffs Thompson Area Against Stroh Quarry, Inc., Dani Korkegi, Gregory Martino, Monique Griffin, Cristi Baldino, Victoria Good, and Arlene Libby (collectively, "Thompson"), and Defendants Coulson Excavating Company, Inc. ("Coulson"), and Board of County Commissioners of Larimer County, Colorado ("Board") each filed cross-motions for summary judgment regarding Thompson's claims under Colo. R. Civ. P. 57.

In its motion for summary judgment, Thompson argues that it is entitled to judgment as a matter of law on its as-applied due process challenge to the Larimer County Land Use Code's ("Code") recusal rule under Colo. R. Civ. P. 57.[1] The Board and Coulson filed cross-motions for summary judgment arguing that they are entitled to summary judgment on the same as-applied claim raised by Thompson, and the Board further contends that it is entitled to summary judgment on Thompson's claims that the USR criteria are unconstitutionally vague, and that the Code's conflict of interest regulation is unconstitutionally vague.

This action involves a dispute about the Board's decision to approve Coulson's use by special review application to operate a gravel-pit mine in Johnstown, Colorado, on a parcel that is zoned for agricultural use and which is surrounded by residential neighborhoods comprised of approximately 1,000 single-family homes. While the application was pending, Commissioner Donnelly accepted $10,000 in campaign contributions from Ken and Dick Coulson, owners of Coulson, representing a significant and disproportionate amount of the contributions Commissioner Donnelly received during the 2016 election cycle. Commissioner Donnelly went on to win that election, and in March 2018, he participated in the Board's decision, casting the deciding vote on Coulson's application.

The Court concludes that, under those circumstances, Commissioner Donnelly's participation and vote on Coulson's application violated Thompson's due-process rights under the Colorado Constitution, and deprived Thompson's right to a fair and impartial decision-maker. The

[1] Following briefing on the merits and oral argument by both parties, the Court construed the substance of Thompson's claim to involve both a facial due-process challenge to the recusal rule *and* an as-applied due-process challenge under Colo. R. Civ. P. 57 to the same rule. The Court addressed this construction in its Order Vacating In-Part June 19, 2018, Order issued December 14, 2018 and its Order Denying Motion to Reconsider, issued February 28, 2019. Given the disposition of Thompson's Rule 57 due-process claim, the Court doesn't reach the merits of the Rule 106 claims.

Court also concludes that neither Larimer County's USR process nor the Code's conflict of interest rules are facially unconstitutional.

Accordingly, the Board's motion for summary judgment is granted as to Thompson's facial challenges to the Code, and the motion is denied as to Thompson's as-applied due process claim. Coulson's motion for summary judgment is also denied. Thompson's motion for summary judgment is granted as to the Rule 57 as-applied challenge to Commissioner Donnelly's conflict of interest. The Board's decision is hereby vacated, and the matter is remanded to the Board with instructions to hold another hearing on Coulson's application with Commissioner Donnelly recused, consistent with the Code.

## I. Factual Background

The following facts, unless otherwise indicated, are not in dispute.

### A. The Property.

In 1993, Coulson purchased property located at 260 SE Frontage Road in unincorporated Larimer County (the "Property"). Compl., ¶ 14, ¶ 28; Coulson Ans., ¶ 14, ¶ 28; Board Ans., ¶ 1. The Property is zoned for agricultural uses within the "FA-Farming" zone. Compl., ¶ 43; Coulson Ans., ¶ 43; Board Ans., ¶ 1. Section 4.1.2 of the Code provides that lands designated as "FA-Farming" are to be principally used for "agricultural" uses. Vol. V at 104–05. Under the Code, mining is expressly described as an "industrial" use. Code § 4.1.1. To engage in mining with the FA-Farming zone, a landowner must receive approval from Larimer County for a use-by-special-review ("USR"). Code § 4.5.1.

### B. The USR Process.

To obtain a USR permit, the applicant must submit an application to the Larimer County Planning Department ("Planning Department"). Vol. I, at 281. After receiving a USR application, the Planning Department sends it to referral agencies and other county departments for review and

comment. *Id.* If a referral agency or department identifies any issues with a USR application, the applicant must resolve those issues with the agency before the application can proceed. *Id.*

Once a USR applicant resolves all referral agency and Planning Department comments and issues, the Planning Commission provides notice to the general public of the USR application and holds a hearing in which the public will have the opportunity to submit written comments in advance and be heard at the hearing. *Id.* at 119–22. After the public hearing, the Planning Commission recommends approval or denial of the application to the Board, and forwards the matter to the Board for its consideration. *Id.* at 281, 864. In turn, the Board holds a hearing on the USR application, providing public notice of the hearing and allowing the public to submit written comments or to testify at the hearing. *Id.* at 114–17.

**C. Coulson's USR Applications.**

In 2002, Coulson first applied for a USR permit to operate an industrial sand and gravel pit mine at the Property ("Proposed Mine"). Compl., ¶ 30; Coulson Ans., ¶ 30; Board Ans., ¶ 30. The parties disagree what happened between 2002 and 2008, but it's undisputed that the application was not approved during that time. In 2008, Larimer County required Coulson to submit a new USR application, which Coulson did in 2009. Compl., ¶ 31; ¶ 32; Board Ans. ¶ 1.

Coulson apparently began resolving referral agency concerns immediately upon submitting its new application. In October 2009, for example, Coulson completed an air displacement modeling study. Vol. I 1302–1673. By August 31, 2010, Coulson also completed a noise study indicating that the proposed mine could be operated in compliance with applicable ordinances and statutes, so long as certain mitigation methods were used. Vol. I at 961, 1675–1701.

After that noise study, however, Coulson's application virtually lay dormant from 2010 to 2015. Coulson apparently didn't think it economically feasible to move forward with the application during that period. As Ken Coulson, one of Coulson's owners, explained at the Planning

Commission hearing, because of the "recession in 2008, [Coulson] decided they had adequate reserves and had other pits that they were mining at the time" and that "[t]he permitting process started back up in 2015 with new analyses and reports." Vol. I at 434. Peter Wayland of Weiland, Inc., an engineering consulting firm representing Coulson, noted that a noise study was conducted in 2015. *Id.* at 434–35.

In September 2016, nearly one year after Coulson completed the 2015 noise study and two months after completing a floodplain review, Coulson submitted a status update with the Planning Department. Vol. I. at 393. The status update from Coulson's land use consultant explained that "there have only been changes made to the project to reduce impacts and insure [sic] public safety with regard to potential flood issues." Vol I. at 390–92. Specifically, the letter noted that "the only significant change to the site plan is to specify a conveyor system instead of overland haul roads … in response to Larimer County Health's suggestion … to reduce dust emissions and noise." *Id.* at 393. In addition, "the PM10 and Crystalline Silica Air Dispersion Modeling Report has been updated" based on the use of the conveyor system. *Id.* at 387, 394. Coulson also noted that a condition of the floodplain review board's approval included "placement of soil cement on the west slope of the east pit for the purpose of protecting the pipeline which runs between the two pits. *Id.*

About the same time as the status update, Coulson "request[ed] that the Community Development Team schedule[] the application for a hearing" before the Planning Commission. Vol. I at 433. As will be explained more fully below, at about the same time, Richard and Ken Coulson made their sizeable contributions to Commissioner Donnelly's reelection campaign. Coulson's Resp to Rog. 1.

More than one year elapsed between Coulson's request and the hearing before the Planning Commission. In November 2017, the Planning Commission held a public hearing on Coulson's USR application. Vol. I, at 431–63, 864–68; Vol. II, at 29:16–24. (By this time, Commissioner

Donnelly had won re-election). The Planning Commission recommended approval of Coulson's USR application to the Board. Vol. I, at 431–63; Vol. IV, at 1.

At approximately the same time (November 2017), Thompson initially raised the issue of conflicts of interest. On November 10, 2017, Thompson wrote to Robert Helmick of the Larimer County Community Development Commission, specifically requesting that Larimer County "ensure that all potential conflicts of interest of the various decisionmakers [be] disclosed as part of the administrative record and that *any decisionmakers with conflicts of interest recuse themselves from any further action on [Coulson's] Application*." Vol. I at 326 (emphasis added). At that time, Thompson identified one such conflict, requesting that "Planning Commissioner Gary Gerrard be formally recused from participating in the Planning Commission's consideration of the Application." *Id.* But Planning Commissioner Gerrard didn't recuse himself.[2] *See id.* at 432 (Planning Commission meeting minutes noting that Commissioner Gerrard was "present").

In the same correspondence, Thompson also requested that the Board adhere to all regulations regarding "conflicts of interest," specifically citing Code §§ 2-71 and 2-67(10). Vol. I., at 326-30; *see also* Vol. V, at 26, 28. Those provisions require a commissioner to (a) act with "unconflicted loyalty" regarding the interests of the citizens in Larimer County, a loyalty that supersedes the commissioner's personal interests or those of any advocacy and interest groups; and (b) recuse himself if the commissioner believes that he has a conflict of interest or that the commissioner cannot make a fair and impartial decision.

On February 26, 2018, the Board held a public hearing on Coulson's USR application. Vol. II at 2. As part of its consideration of the application, the Board invited and received written evidence and took testimony at the hearing. Vol. IV at 1. At the conclusion of the hearing, the Board

[2] The nature of Commissioner Gerrard's conflict is unclear, but Thompson didn't press a due-process violation from the commissioner's participation at the hearing.

voted 2-1 in favor of the application, with Commissioner Donnelly voting in favor of it. *Id.* at 213–14.

Almost a month after the Board's hearing, but before the Board issued its findings and decision, Thompson sent a letter on March 19, 2018, to the County Attorney, Jeannine Haag, indicating that Ken and Dick Coulson had contributed to Commissioner Donnelly's campaign committee and requesting that he recuse himself from further involvement in the proceedings. Vol. I at 298–99. One day later, on March 20, 2018, the Board issued its Findings and Resolution Approving The Petition of Coulson Excavating Company, Inc. Vol. IV at 1–13.

**D. Commissioner Donnelly.**

By trade, Commissioner Donnelly is a private land surveyor, a profession he engaged in between 1994 to January 2008, in Loveland, Colorado. He worked for a company called CDS. Coulson's Supp. Resp. to Rog. 1; Board's Resp. to Rog. 1.

In that capacity, Commissioner Donnelly had a professional relationship with Coulson, performing surveyor work for the company for several years. The relationship began in 1999, when Loveland Commercial Builders hired both Coulson and CDS to perform work on a subdivision called Frank Farms. *Id.* Commissioner Donnelly estimated that Coulson hired him to conduct land surveys on approximately "10 projects during [his] 14 years as a surveyor" Rog. 1. While Commissioner Donnelly didn't recall the exact number of projects, *id.*, Coulson states that between 1999 and 2005, it and CDS worked on five projects together.[3] Coulson Resp. to Rog. 1.

[3] Thompson's attempt to dispute the extent of Commissioner Donnelly's work history with Coulson is nothing more than argument, which can't create a material factual dispute at summary judgment. *See* § II, *infra* (discussing cases that a party can't use pretense, or apparent formal controversy to avoid summary judgment); *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978) (Colo. R. Civ. P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists). As set forth in the body, Coulson provided concrete projects and facts figures, which Thompson failed to dispute.

Commissioner Donnelly wasn't Coulson's employee and Coulson didn't hire him Donnelly directly.[4] *Id.* During the time frame that Donnelly was a surveyor, Coulson and its owners, Dick and Ken Coulson, never had any conversations with Donnelly other than about the surveying work he performed. *Id.*

The Coulson-CDS surveying projects, which ended in 2005, represent the extent of Commissioner Donnelly's professional relationship with Coulson or its principals, Ken and Dick Coulson (the "Coulsons"). *Id.* Commissioner Donnelly and the Coulsons have never been friends or had a social relationship. *Id.*; *see also* Ex. 3. As far as the Coulsons recollect, their last personal interaction between them and Commissioner Donnelly occurred in 2008 during Commissioner Donnelly's 2008 election campaign, in which he sought a campaign contribution from them. Coulson's Resp. and Board's Resp. to Rog. 1.

Commissioner Donnelly won the 2008 election and became a Larimer County Commissioner in January 2008; he was re-elected in 2012 and 2016. Official Larimer County Election Results, www.larimer.org/clerk/elections/records-data/past-info/results, follow the "General Election Summary" hyperlinks for 2008, 2012 and 2016 elections.

The breakdown of Commissioner Donnelly's campaign contributions during the 2012 and 2016 election cycles is as follows. During the 2012 candidate four-year election cycle (designated as 12/5/2008 – 12/6/2012 by the Colorado Secretary of State) ("2012 election"), Commissioner Donnelly's campaign committee received $31,726.19 in campaign contributions. Board MSJ at Ex. B. Of that amount, Dick and Ken Coulson each contributed $500, for a combined total of $1,000. *Id.* Commissioner Donnelly's opponent was Karen Stockley, whose campaign committee received

[4] For the same reasons cited above, Thompson cannot create a dispute merely by argument, but must present evidence to demonstrate that a dispute exists. *See S.N.*, 329 P.3d at 282. The Court concludes no such dispute exists here.

campaign contributions totaling $21,237.20. *Id.* at Ex. C. Commissioner Donnelly won that re-election.

For Commissioner Donnelly's 2016 campaign, his candidate committee reported total contributions of $53,580, which it raised between March and October 2016. Ex. 3 Board's Am. Ans. and Ans. to Req. to Admit No. 6. The committee also spent a total of $56,342.16 during the 2016 election. Coulson MSJ at Ex. 2.

For the 2016 election, Commissioner Donnelly didn't personally seek campaign contributions from the Coulsons. Instead, a representative from Commissioner Donnelly's political party stopped by Coulson's offices to solicit a donation. Coulson's Resp to Rog. 1. Shortly after, in August and September 2016, Dick Coulson and Ken Coulson each contributed $5,000 to Commissioner Donnelly's campaign committee, respectively, for a combined total of $10,000. *Id.* The Coulsons' campaign contributions amounted to 18.6% of Commissioner Donnelly's total new contributions for the 2016 election and 17.7% of the total money his committee spent on that election. *Id.*

Notably, the Coulsons' contributions for the 2016 election represented a *10-fold increase* from their contributions in the 2012 election. At the time of the Coulsons' 2016 election contributions, it's undisputed that Coulson's application was pending before Larimer County and that Coulson was still working on agency and planning department issues related to the application. Vol. I at 331–33, 348–89, 431–63, 864–68.

But the Coulsons weren't the only high-dollar contributors to Commissioner Donnelly's campaign committee. During the 2016 election, the campaign committee received the following campaign contributions of $5,000 or more:

a. $10,000 from Ken Coulson and Dick Coulson ($5,000 each);

b. $7,500 combined from the Lind family (Martin and Viki) and Vima Partners, LLC;

c. $5,000 combined from the Gerrard family (Gary, Mary, Nathan);

d. $5,000 combined from the McWhinney family (Chad and Troy); and

e. $5,000 from Lori Graves.

The 2016 election featured a rematch between Commissioner Donnelly and Karen Stockley. For her part, she received campaign contributions totaling $19,027.10. Board MSJ at Ex. F. As the above campaign-contribution figures show, Commissioner Donnelly outraised Ms. Stockley by a ratio of almost 3-to-1. Commissioner Donnelly won the 2016 election for County Commissioner by a margin of 55.16% (99,191 votes) to 44.84% (80,647 votes). Board MSJ Ex. G.

When Coulson's application came before the Board on February 26, 2018, Commissioner Donnelly subjectively believed that he could make a fair and impartial decision based on the review standards and evidence. Ex. 3, Board's Ans. Req. to Admit No. 9.

## II. Applicable Legal Standards.

Under Colo. R. Civ. P. 56(c), summary judgment shall enter when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." "The paramount purpose of summary judgment is to expedite litigation by avoiding needless trials where no genuine issue exists as to any material fact and the movant is entitled to judgment as a matter of law." *Dubois v. Myers*, 684 P.2d 940, 943 (Colo. App. 1984).

A party seeking summary judgment bears the initial burden of establishing that there is no dispute regarding material facts. *Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). A factual dispute is "material" if it'd affect the outcome of the case. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). To meet that burden, the moving party may rely on "pleadings, depositions, answers to interrogatories, … admissions on file, [and] affidavits." Colo. R. Civ. P. 56(c). While "the form of the evidence, such as an affidavit, need

not be admissible at trial, the content or substance of the evidence must be admissible." *People ex rel S.N. v. S.N.*, 329 P.3d 276, 282 (Colo. 2014).

The moving party may satisfy its burden by showing the absence of evidence in the record to support the nonmoving party's case. *Id.* If the moving party demonstrates no disputed material facts exist, the burden shifts to the nonmoving party to demonstrate the existence of a disputed material fact. *Id.*

The Court must give the nonmoving party all favorable inferences that reasonably may be drawn from the evidence. *Id.* But the nonmoving party can't use "pretense, or apparent formal controversy," to avoid summary judgment. *Id.* Similarly, the nonmoving party cannot "merely assert[] a legal conclusion without evidence to support it. *Id.* When faced with an affidavit affirmatively showing the absence of a triable issue of material fact, the nonmoving party cannot rely on allegations or denials in the pleadings to avoid summary judgment. *Id.* Nor may the nonmoving party raise a genuine issue of material fact "simply by means of argument." *Id.* An affirmative showing of specific facts, uncontradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Civil Service Com'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991).

Further, evidence introduced to defeat or support a motion for summary judgment must be sworn, competent and based on personal knowledge, and set forth facts that would be admissible at trial. Colo. R. Civ. P. 56(e). A "court must disregard documents referred to in a motion for summary judgment that are not sworn or certified." *Cody Park v. Harder*, 251 P. 3d 1, 4 (Colo. App. 2009); *see also Struble v. Am. Family Ins. Co.*, 172 P.3d 950, 955 (Colo. App. 2007).

## III. Conclusions of Law.

Under Colo. R. Civ. P. 57 the Court "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Colo. R. Civ. P. 57(a). Such declaration has the force and effect of a final judgment. *Id.*

When "mere review of the record under [Colo. R. Civ. P.] 106(a)(4) would not afford adequate relief to the aggrieved party, a declaratory judgment action under [Colo. R. Civ. P.] 57 is available and may be joined with a proceeding for [Colo. R. Civ. P.] 106(a)(4) review." *Two G's, Inc. v. Kalin*, 666 P.2d 129, 133–34 (Colo. 1983). Thus, where review of the record is an insufficient remedy, "the plaintiff is not limited to the record, but may introduce other evidence relevant to the issues presented. *Tepley v. Pub. Employees Ret. Ass'n*, 955 P.2d 573, 582 (Colo. App. 1997) (citing Colo. R. Civ. P. 57(i) and (m)).

The parties seek summary judgment on Thompson's Rule 57 claims that: (1) the Code's USR criteria are unconstitutionally vague; (2) the Code's conflict of interest rule is unconstitutionally vague and permits unlawful spot zoning; and (3) the Code's conflict of interest rule violate due process as-applied to the circumstances of this case. Naturally, the Board and Coulson disagree with Thompson. The Court addresses each claim in turn.

### A. Larimer County's Special Review Criteria are Facially Constitutional.

Thompson mounts a facial constitutional challenge on the Code's USR criteria on the ground that they're unconstitutionally vague because critical terms are undefined in the Code. Thompson also contends that the Board's approval of Coulson's USR application is akin to upzoning a parcel for the narrow interests of a single land owner, at the detriment of all surrounding

neighbors.[5] The Board argues that because there is no factual dispute regarding the meaning and understanding of the USR criteria, Thompson's argument fails. The Court agrees with the Board.

**1. Vagueness Challenge.**

The two provisions in the USR criteria that Thompson believes are unconstitutionally vague are set forth in § 4.5.3. The provisions at issue state:

> A. The proposed use will be compatible with existing and allowed uses in the surrounding area and be in harmony with the neighborhood;
>
> * * *
>
> D. The proposed use will not result in a substantial adverse impact on property in the vicinity of the subject property.

Code § 4.5.3(A), (D).

Facial challenges to statutes are extremely difficult to prevail on. As the United States Supreme Court has put it, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

"Municipal ordinances, like statutes, are presumed constitutional." *Kruse v. Town of Castle Rock*, 192 P.3d 591, 597 (Colo. App. 2008) (citing *E–470 Public Highway Authority v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004)). A party challenging the ordinance must prove beyond a reasonable doubt that the Code is unconstitutionally vague in all possible applications. *Id.* at 597–98.

[5] Thompson objects to the Board's motion for summary judgment on the ground that it impermissibly seeks to reopen argument regarding Thompson's Colo. R. Civ. P. 57 facial challenge to Larimer County's conflict of interest rules. Coulson similarly states that it understands the Court's December 14, 2018 and March 11, 2019 orders as requiring briefing only on the as-applied due-process challenge. Thompson and Coulson are incorrect, as the Court stated that it "expects the *Rule 57 claims* to be resolved via cross-motions for summary judgment" and that "a discovery schedule to adjudicate plaintiffs' Colo. R. Civ. P. 57 *claims* is appropriate." March 11, 2019 Case Mgmt. Ord., at 1, 6 (emphasis added). Thus, the Court will consider such claims by relying on the parties' existing briefing on those claims.

"A statute or ordinance is unconstitutionally vague … if persons of common intelligence must necessarily guess as to its meaning and differ as to its application." *Id.* (internal citations omitted) (citing *Watso v. Colo. Dep't of Social Servs.*, 841 P.2d 299, 309 (Colo. 1992)). The ordinance must therefore provide "fair notice and set forth sufficiently definite standards to ensure uniform, nondiscriminatory enforcement." *Id.*

"A law is void for vagueness where its prohibitions are not clearly defined." *People v. Baer*, 973 P.2d 1225, 1233 (Colo. 1999) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Rickstrew v. People*, 822 P.2d 505, 506–07 (Colo. 1991)). "Vague laws offend due process because they (1) fail to give fair notice of the conduct prohibited, and (2) do not supply adequate standards for those who apply them in order to prevent arbitrary and discriminatory enforcement." *Id.* (citing *People v. Holmes,* 959 P.2d 406, 414 (Colo. 1998).

Broad terms and generalities are not equivalent to vagueness and need not be defined with "mathematical precision" to withstand a vagueness challenge, so long as the ordinance lends itself to alternative—constitutional—constructions. *Kruse*, 192 P.3d at 597 (citing *Stamm v. City & County of Denver,* 856 P.2d 54, 56 (Colo. App. 1993)). Moreover, there's no mandate that each word in an ordinance be specifically defined, and the Court may look to dictionaries and case law to determine the probable legislative intent. *Id.*

The Court has a duty to give language used in regulations its generally accepted meaning and to interpret language "in a reasonable and practical manner so as to impart a rational and cogent meaning to it." *Id.* Thus, the Court may not adopt hyper-technical readings of statutes where a fair outcome can be achieved through "[a] common sense reading of the statute." *Americans United for Separation of Church & State Fund, Inc. v. State,* 648 P.2d 1072, 1086 (Colo. 1982) (quoting *People v. Garcia,* 595 P.2d 228, 231 (Colo. 1979)).

Thompson contends that the Code is unconstitutionally vague in permitting and encouraging *de facto* spot zoning through an unreasonably subjective and ill-defined USR process. Specifically, Thompson argues that the terms "be in harmony with the neighborhood," "will not result," "substantial adverse impact," and "in the vicinity" aren't defined in the Code and are so ambiguous and subjective to the extent that they give the Board unchecked discretion. In considering all of the applications of the language in question, the Court is left with the firm conclusion that the language passes constitutional muster.

Here, the § 4.5.3 standards aren't constitutionally vague for several reasons. First, while the terms aren't specifically defined in the Code, substantially similar language frequently appears in regulations, which have been found constitutionally definite. *See C & M Sand & Gravel, Div. of C & M Ready Mix Concrete Co. of Boulder v. Bd. of Cty. Comm'rs of Boulder Cty.*, 673 P.2d 1013, 1018 (Colo. App. 1983). In *C&M*, the Court of Appeals held that a zoning regulation setting out general standards for special use requirements were sufficient, including: "(1) [the use] will be *in harmony* and compatible with the character of the surrounding areas and neighborhood; … (4) will not have a *material adverse effect* on community capital improvement programs; … (6) *will not result* in undue traffic congestion or traffic hazards; (7) will not cause significant air, water, or noise pollution; … and (9) will not otherwise be detrimental to the health, safety, or welfare of the present or future inhabitants of the county." *Id.* (emphasis added).

Second, the challenged terms aren't unconstitutionally vague because any party may look to a term's generally accepted meaning if it is not specifically defined in a code to glean definiteness. *Kruse*, 192 P.3d at 599. Doing so here renders the terms at issue sufficiently definite. "Harmony," for instance, means "in agreement or accord; or conformity." *Harmony*, BLACK'S LAW DICTIONARY (10th ed. 2014). Read in context with the accompanying language of § 4.5.3, being in harmony with the neighborhood means that the use is in conformity or in agreement with the neighborhood. For

"will not result" the Court need look no further than the plain meaning of the words to understand them. *See St. Vrain Valley Sch. Dist. RE-1J v. A.R.L. by & through Loveland*, 325 P.3d 1014, 1019 (Colo. 2014) (the Court gives "effect to the statute's plain and ordinary meaning when the language is unambiguous.").

While such terms are undoubtedly "somewhat uncertain in the abstract, [they] may be upheld when shown to be sufficiently definite in the context of actual application." *Wilkinson v. Bd. of Cty. Comm'rs of Pitkin Cty.*, 872 P.2d 1269, 1278 (Colo. App. 1993). In *Wilkinson*, the Court of Appeals found a zoning ordinance wasn't impermissibly vague because "the contested county policies [were] sufficiently definite to be upheld in view of evidence presented to support their application. *Id.* Those policies, which dealt with, among others, compatibility with existing adjacent neighborhoods, were sufficiently definite when the trial court determined the record contained data on the potential impact of the proposed development to wildlife, recreation, and neighboring land. *Id.*

Here, as in *Wilkinson*, the general terms "in the vicinity" and "substantial adverse impact" are also sufficiently definite upon review of the Board's Findings and Resolution. 872 P.2d at 1278. The Board effectively demonstrates that "in the vicinity" involves the property which is or may be impacted by the proposed use. *See* Vol. IV at 6–7. For instance, the Board considered the professional noise study's conclusion that the noise generated from the Proposed Mine "will be less than 55dba at any surrounding residential property line." *Id.* at 7. The Board also considered that "[f]urther review of the application indicted the technical standards required for the approval of this application and demonstrated that it will not result in a substantial adverse impact." *Id.* Thus, sufficient evidence exists in the record to further clarify the meaning of "in the vicinity" and "substantial adverse impact" and to render it constitutionally definite.

Accordingly, the Court concludes that the challenged terms aren't unconstitutionally vague and judgment will enter in the Board's favor on this claim.

**2. Spot Zoning.**

Thompson argues that the Board's decision amounted to unlawful spot zoning. Thompson's argument doesn't hold water. Colorado law prohibits unlawful spot zoning which "creates a small island of property with restrictions on its use different from those imposed on the surrounding property." *Whitelaw v. Denver City Council*, 405 P.3d 433, 445 (Colo. App. 2017) (citing *Little v. Winborn*, 518 N.W.2d 384, 387 (Iowa 1994)). "Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." *Clark v. City of Boulder*, 362 P.2d 160, 163 (Colo. 1961).

As applied here, *Clark* does no more than state that the property owners could rely on the existing zoning regulations to understand what uses were permissible on the property. As noted above, the existing use is FA – Farming, which has multiple uses by right, but it also permits other uses by special review. Code § 4.1.1; Compl., ¶ 43; Coulson Ans., ¶ 43; Board Ans., ¶ 1. Thus, the Code makes clear that no rezoning is occurring, the land is still FA – Farming. While the changed circumstances of land surrounding the site *might* warrant a rezoning, no such proceeding was undertaken. Indeed, the record is clear that over the course of the application's life, there were repeated notices that the land was likely to be mined.

Accordingly, given the undisputed material facts, the Court concludes that the USR provisions in question are not unconstitutionally vague, and that the decision doesn't amount to unlawful spot zoning, therefore the Board is entitled to judgment as a matter of law on this issue.

### B. Larimer County's Voluntary Conflict of Interest Rule is Facially Constitutional.

Thompson next contends that the County's conflict of interest regulation set forth in the Code is unconstitutionally vague and violated Thompson's due-process rights by permitting Commissioners to subjectively determine whether they have a conflict of interest.[6] The Board and Coulson disagree, arguing principally that the Code section is constitutionally valid.

The legal principles from the preceding subsection apply here, too. As with § 4.5.3, the conflict-of-interest provision (Code § 2-67(10)) is unconstitutional only if it provides no standard of conduct at all. *See Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 393 P.3d 533, 539 (Colo. 2017). The Court gives language used in regulations its generally accepted meaning, *id.*, and begins with the presumption that the Code is constitutional. *Dolan v. Fire and Police Pension Ass'n*, 413 P.3d 279, 286 (Colo. App. 2017). Thus, for Thompson to succeed on its facial challenge that the provision is void for vagueness, they must show, beyond a reasonable doubt, that there is no application in which it's constitutional—something they can't do. *See Kruse*, 192 P.3d at 598.

Because the constitutional vagueness challenge also depends on the interpretation and meaning of § 2-67(10), the Court will apply canons of statutory interpretation. When statutory interpretation is at issue, the Court's "primary objective is to ascertain and effectuate the intent of the General Assembly." *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). To do so, the Court's initial task is "to determine whether the statutory language has a plain and unambiguous meaning." *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009). The Court gives "effect to the statute's plain and ordinary meaning when the language is unambiguous." *St. Vrain Valley*, 325

[6] As with the previous claim, Thompson objects to the Board's motion for summary judgment arguing that the motion impermissibly seeks to reopen argument regarding Thompson's Colo. R. Civ. P. 57 facial challenge to Larimer County's conflict of interest rules. The Court overrules that objection for the same reasons cited above.

P.3d at 1019. So, "if the statutory language is clear," the Court applies it as written. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011).

The Court determines a provision's plain meaning by considering "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Sheep Mountain All. v. Bd. of Cty. Comm'rs, Montrose Cty.*, 271 P.3d 597, 601 (Colo. App. 2011). The Court may look to the dictionary for assistance in understanding the plain meaning of the terms used. *People v. Voth*, 312 P.3d 144, 149 (Colo. 2013). Moreover, the Court gives effect to legislative intent by construing all parts of a statute as consistent, harmonious, and sensible. *St. Vrain Valley*, 325 P.3d at 1019.

The Code prohibits a commissioner's participation—thus requiring recusal—in any quasi-judicial determination in which he determines that he cannot be fair and impartial or in which he has a conflict of interest:

> A member of the board of county commissioners who, in their sole opinion, believe they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision in a legislative or quasi-judicial decision, will recuse themselves from the discussion and decision. Any recusal will be made prior to any board discussion of the issue and the board member will leave the room for the remainder of the discussion of the issue.

Code § 2-67(10).

The Court is troubled that the Code has failed to define the key terms "conflict of interest," "fair," or "impartial" and, as if that weren't enough, it has failed to provide any further guidance to a commissioner on how to interpret those seemingly crucial terms.[7] Such a deficiency appears to leave

[7] Contrast the Code's minimally sufficient approach with the Colorado Code of Judicial Conduct's provisions on recusal or disqualification. While the Court understands that Code of Judicial Conduct doesn't apply to commissioners, a comparison is useful for present purposes. For instance, the Code of Judicial Conduct is exceedingly thorough in prescribing the instances in which a judge must disqualify himself from a case. *See* C.J.C.R. 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances…"). That provision lists at least five areas in which

a commissioner to his or her own devices when considering recusal. Indeed, the Code doesn't even direct the commissioner to seek legal advice on the issue. But the Supreme Court directs that this Court supply the common meaning of those terms to determine whether the provisions are unconstitutionally vague. *Voth*, 312 P.3d at 149.

The terms' plain and ordinary meanings demonstrate the provisions are not unconstitutionally vague. A "conflict of interest" is a "real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Conflict of Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Fair" means "[c]haracterized by honesty, impartiality, and candor; just; equitable; disinterested" or "[f]ree of bias or prejudice". *Fair*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Impartial" means "[n]ot favoring one side more than another; unbiased and disinterested; unswayed by personal interest." *Impartial*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, a commissioner has a "conflict of interest" when she has a real or seeming incompatibility of personal interests and public duty. The commissioner cannot remain "fair and impartial" when he or she cannot act honestly, impartially, justly or in an equitable and disinterested manner and cannot avoid favoring one side more than another or being swayed by personal interest.

Another nearby provision of the Code related to the same subject provides insightful language and direction to a commissioner who may be considering recusal. Subsection 2-71(1) provides that commissioners must represent with "unconflicted loyalty" the interests of all the citizens of the county and that such loyalty supersedes any conflicting loyalty to anyone else, including the commissioner's own personal interest:

> Members of the board of county commissioners must represent unconflicted loyalty to the interests of the citizens of the entire county. This accountability supersedes any conflicting loyalty such as that to any advocacy or interest groups, or

---

disqualification must occur, defines each of the terms with an asterisk, and then provides additional comments on each specific ground for disqualification. By contrast, the Code offers no such guidance to a commissioner who's considering recusal.

> membership on other boards or staffs. This accountability also supersedes the personal interest of any board member acting as an individual consumer of the county government's services. Members of the board of county commissioners must avoid any fiduciary conflict of interest, ex-parte communication or nepotism conflicts.

Vol. V, p. 28 (citing Code § 2-71(1), (2)).

Both provisions are related to the same subject matter and the Court construes them in *pari materia*. While § 2-67(10) deals with a commissioner's recusal due to a conflict of interest or her inability to be fair and impartial, § 2-71(1) prescribes a general mantra with which a commissioner must approach all of her official duties: with "unconflicted loyalty" to her constituents. Statutes "pertaining to the same subject matter are to be construed *in pari materia* to ascertain legislative intent and to avoid inconsistencies and absurdities." *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043 (Colo. 1991) (citing *Darnall v. City of Englewood*, 740 P.2d 536, 537 (Colo. App. 1987)). "The legislature is also presumed to intend that the various parts of a comprehensive scheme are consistent with and apply to each other, without being required to incorporate each by express reference in the other." *BP America Prod. Co. v. Patterson*, 185 P.3d 811, 813 (Colo. 2008).

Read together, §§ 2-67(10) and 2-71(1) provide definite—albeit minimal—guidance to a commissioner who's considering recusal and render the conflict of interest provision not unconstitutionally vague. Notwithstanding Thompson's contentions that the conflicts ordinance is vague, § 2-67(10) lends itself to constitutional constructions, which the Court must adopt. *See Kruse*, 192 P.3d at 597 (citing *People ex rel. City of Arvada v. Nissen,* 650 P.2d 547, 550 (Colo. 1982)).

When the provisions are construed in *pari materia*, several constitutional applications present themselves. Let's say, for example, that a commissioner's spouse filed an application for USR for certain land under county jurisdiction. Every reasonable commissioner who considered §§ 2-67(10) and 2-71(10) would easily conclude that he'd have a conflict of interest given his close relationship to the applicant. Undoubtedly, in this hypothetical, the commissioner couldn't reasonably "make a

fair and impartial decision in a … quasi-judicial capacity," Code § 2-67(10), because doing so would improperly place his *personal interest* in the matter above his "unconflicted loyalty" to the county's citizens. *Id.* § 2-71(10).

Let's take another example closer to the present circumstances. Assume that another applicant—unrelated to our conflicted commissioner—with a different application pending before the county, donated 100% of the total campaign contributions for the commissioner's re-election campaign. Let's also assume that the commissioner won the election. Again, every reasonable commissioner who considered both provisions of the Code would conclude that she couldn't make a fair and impartial decision on the application and would recuse herself. Because the commissioner would seemingly owe, in large part, her victory to the applicant's campaign contributions, the commissioner would violate her duty of "unconflicted loyalty" to the county's citizens by participating in, or voting on, the application from her generous campaign donor.

In both hypothetical scenarios, the commissioner determined based on his or her "sole opinion" that she has a conflict of interest and thus recuses herself from participating in the proceeding. That commissioner, in the Court's view, acted reasonably. While generally that's a poor approach to follow because the Code provides virtually no guidance, it nonetheless passes, by a hair, constitutional muster because of the key terms' plain meaning. Of course, that leaves all the unreasonable hypothetical commissioners out there, who may not recuse themselves when presented with such stark scenarios. But solely because § 2-67(10) "might be insufficient in some particular circumstances," *Salerno*, 481 U.S. at 751, it doesn't follow that the provision is facially unconstitutional.[8]

[8] The Court urges the Board to adopt a more precise recusal provision that includes both specific definitions for each of the key terms in § 2-67(10) and an objective—rather than a subjective—standard that relies solely on the "sole opinion" of the commissioner who faces a potential conflict of interest.

Moreover, that the decision rests in the commissioner's "sole opinion" doesn't render the provision unconstitutionally vague. That's not unlike a disqualification decision for a judge, who must herself decide whether recusal is necessary. Indeed, if the Commissioner *does* have a conflict, the Commissioner *must* recuse him or herself. The Code language itself provides that the Commissioner "*will* recuse themselves from the discussion and decision." Code § 2-67(10) (emphasis added). The Court construes "will" as "must" in this context. And, at a minimum, "will" is the equivalent of "shall" here, meaning that the commissioner *is required* or *is obligated* to recuse himself. *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 699 (Colo. App. 2010).

Further, it's wrong, as Thompson contends, that no recourse exists to a commissioner's refusal to recuse even in the most blatant of circumstances. Indeed, the Constitution itself provides the necessary "floor" by which to determine whether a commissioner violated a party's due-process rights in making a quasi-judicial decision. *See City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010). When a commissioner acts as a quasi-judicial decision-maker, as is the case here, "the fundamental protections of neutrality and fairness [ ] apply." *Id.* It is also conceivable that Colo. R. Civ. P. 106(a)(4) might provide a similar backstop in instances where a record sufficiently addresses a conflict of interest issue.

In sum, the language of Code § 2-67(10) and case law are specific enough to provide a person of common intelligence with notice of when that particular code provision may be violated. *See People v. Shell*, 148 P.3d 162, 173 (Colo. 2006) (citing *People v. Hickman,* 988 P.2d 628, 644 (Colo. 1999)). Accordingly, the conflict of interest provision is not facially void for vagueness and judgment will enter in the Board's favor on this claim.

### C. Larimer County's Voluntary Conflict of Interest Rule As-Applied to the circumstances of this case violated Thompson's Due Process Right.

While § 2-67(10) is facially constitutional, Thompson also challenges on due-process grounds Commissioner Donnelly's failure to recuse himself from participating in Coulson's

application. Because the undisputed material evidence establishes beyond a reasonable doubt that Commissioner Donnelly's failure to recuse posed a risk of actual bias or prejudgment on Coulson's application, Thompson has shown a due-process violation and is entitled to judgment as a matter of law. Accordingly, judgment shall enter in Thompson's favor on this claim. The Board's decision is, therefore, vacated and the matter is remanded to the Board to hold another hearing on Coulson's application with Commissioner Donnelly recused.

The Court's analysis of Thompson's as-applied challenge begins with two threshold issues raised by Coulson and the Board. They jointly argue that the campaign contributions didn't violate Thompson's due process rights because (1) Thompson waived its objection on the issue of bias related to the campaign contribution, removing the Court's authority to review the claim; and (2) that the campaign contributions are not a direct, personal, substantial, or pecuniary interest in the pending matter. The Court rejects these contentions, each of which is addressed in turn.

**1. Thompson did not waive its objection on the issue of bias related to the campaign contribution.**

The Board treads old ground, arguing that Thompson waived its objection on the issue of bias related to campaign contributions, thus depriving the Court of jurisdiction to review the claim. Thompson responds that the Court has already ruled on this issue, concluding that Thompson properly preserved the issue. The Court sees no reason to amend its prior ruling.

The Court construes the Board's argument as seeking reconsideration of a prior Order. While the request is untimely, the Court will nevertheless consider it. Motions for reconsideration are "disfavored." Colo. R. Civ. P. 121, § 1-15(11). "A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." *Id.*

The Board failed to make the required showing under Rule 121 § 1-15(11). Reconsideration isn't appropriate because there's no error of law that mandates a different result nor will manifest

injustice result. As the Court discussed in its prior Order Denying Defendants' Motion For Summary Judgment, Thompson timely raised the issue of Commissioner Donnelly's potential conflict of interest three months before the Board's hearing and final decision on Coulson's application:

> It's undisputed that Thompson Area raised the conflicts issue well in advance of the Board's hearing and requested that any decisionmaker with a conflict recuse himself. And Thompson Area did so again, two days before the formal decision, by pointing to Commissioner Donnelly's potential conflict.

Order at 13–15; *see also* Vol. I at 298–99; 326.

That ruling is supported by the record evidence and is correct. Accordingly, the Board's request is denied.

**2. Thompson's Complaint Includes an As-Applied Due Process Challenge to Code § 2-67(10).**

Coulson levies another attack against Thompson's as applied due-process challenge to § 2-67(10), stating that the challenge must fail as a matter of law because the Code "mirrors due process" and the recusal requirement is not voluntary. Coulson contends that the claim at issue here is not an as-applied constitutional challenge because it is a "factual determination [which] *resulted* in a constitutional violation, which is not an as-applied challenge to the statute itself." Coulson Mtn. at 10. As the argument goes, merely asserting that someone misapplied the statute is not an as-applied challenge to the statute itself. Coulson's arguments are without merit.

Generally, to succeed in a facial challenge, the plaintiff must show that there are no circumstances under which the statute can be applied in a constitutional manner. *People v. Trujillo*, 369 P.3d 693, 696 (Colo. App. 2015). By contrast, as-applied challenges allege "the statute is unconstitutional as to the *specific circumstances under which a defendant acted*." *Id.* (citing *People v. Gardner,* 250 P.3d 1262, 1268 (Colo. App. 2010)).

Here, while the Court concluded that § 2-67(10) wasn't facially unconstitutional, that conclusion doesn't preclude the Court from determining the statute might be unconstitutional as-applied to a particular set of facts. *See Trujillo*, 369 P.3d at 697. Nevertheless, Coulson contends that because the recusal rule—Code § 2-67(10)—is consistent with due process, it can't be unconstitutional as-applied. That argument is plainly illogical.

For one, solely because a statute is facially valid, meaning that it's constitutional in at least one application, it doesn't follow that the same statute will be valid as applied against a different factual scenario. While a statutory provision "might be insufficient in some particular circumstances," *Salerno*, 481 U.S. at 751, a court shouldn't strike down the provision in toto when at least some constitutional applications exist—that is, don't throw out the baby with the bath water.

Besides, if Coulson were correct, it would render all as-applied challenges meaningless, at the expense of the general policy that favors hearing as-applied challenges over facial ones. *See e.g.*, *Indep. Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. App. 2008) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–52 (2008)) (a provision may be unconstitutional on its face or as-applied, but "[f]acial challenges are disfavored because (1) courts may be forced to rely on speculation, (2) there is a risk of premature statutory interpretation, (3) courts may have to anticipate questions of constitutional law when unnecessary, (4) courts may have to formulate constitutional rules broader than those required by the precise facts to which they would be applied, and (5) they may prevent the implementation of laws that embody the will of the people"). Indeed, Coulson admits as much, citing caselaw for the premise that the as-applied constitutional challenge requires the party to establish that "*the statute is unconstitutional* under the circumstances in which the plaintiff has acted or proposes to act." Coulson Mtn. at 9 (citing *Maxwell*, 401 P.3d at 520). Thus, a challenge may be brought to the constitutionality of a statute as it was applied under the circumstances of this case.

Here, Thompson contends that even if the statute is generally constitutional, it operated unconstitutionally as to Thompson because of the circumstances in which Commissioner Donnelly failed to recuse himself. This is consistent with an as-applied constitutional challenge. *See Trujillo*, 369 P.3d at 696. It's plausible to assert an as-applied due-process violation under circumstances when, as here, a decisionmaker has an objective conflict of interest—notwithstanding that decision-maker's *subjective* belief to the contrary—and the rule does nothing to stop that a commissioner from continuing to participate in the decision. Such an outcome falls below the constitutional floor required by the Due Process Clause. *See City of Manassa*, 235 P.3d at 1057.

Coulson's contentions to the contrary are unpersuasive for two reasons. First, the case Coulson cites to *General Outdoor Advertising Co. v. Goodman* doesn't directly addressed as-applied challenges, and instead only deals with a facial attack. 262 P.2d 261, 263 (Colo. 1953). Second, Coulson's arguments that governments need not enact legislation which is duplicative of protections afforded by the constitution are correct, but inapposite. As the Court concludes below, the Code as-applied in this circumstance fell *below* the constitutional floor. Thus, the Court rejects Coulson's argument that Thompson's as-applied due-process challenge fails as a matter of law.

**3. Coulson's campaign contributions to Commissioner Donnelly created a significant risk of bias under the circumstances**.

"To prevail on an as-applied constitutional challenge, the challenging party must establish that the statute is unconstitutional under the circumstances in which the plaintiff has acted or proposes to act." *People v. Maxwell*, 401 P.3d 518, 520 (Colo. App. 2017) (citing *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011). In holding a statute unconstitutional as applied, its future application in a similar context is prohibited, but it does not render the statute inoperative." *Id.*

A statute is presumed constitutional, and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt. *People v. Baer*, 973 P.2d 1225, 1230 (Colo.

1999). The principle applies regardless of whether the challenge is facial or as-applied to a specific set of circumstances. *Trujillo*, 369 P.3d at 696.[9]

Under Colorado law, a local government's land-use determinations are considered quasi-judicial for the purposes of judicial review. *Margolis v. Dist. Court, In & For Arapahoe Cty.*, 638 P.2d 297, 305 (Colo. 1981). Those serving in quasi-judicial capacities are presumed to act with integrity, honesty, and impartiality. *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983).

A quasi-judicial proceeding violates due process only if the presumption of honesty and integrity is overcome by a showing of a conflict of interest on the part of the decision-maker. *Id.* What constitutes a conflict of interest reflects different policy considerations based on the context. *City of Manassa*, 235 P.3d at 1055. Such conflicts arise where the decision-maker has a personal, financial, or official stake in the outcome of the matter, *Scott*, 672 P.2d at 227–28, or when the decision-maker's interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 884.

The burden of rebutting this presumption rests on the party challenging the quasi-judicial decision. *Scott*, 672 P.2d at 227. A party challenging a quasi-judicial decision must show substantial prejudice which invalidates the agency action to rebut the presumption. *Whitelaw*, 405 P.3d at 438. Nevertheless, quasi-judicial decision-makers are not held to the same disqualification standards as judges, *City of Manassa*, 235 P.3d at 1057, and most matters regarding judicial disqualification do not

[9] Colorado appellate decisions are divided on the burden of proof necessary as-applied constitutional challenges. *Cf. Sanger v. Dennis,* 148 P.3d 404, 410–11 (Colo. App. 2006) (as applied challenges must show only a reasonable probability that the statute is unconstitutional); *with People v. Slaughter*, 439 P.3d 80, 83 (Colo. App. 2019); *Trujillo*, 369 P.3d at 696 (the burden of proof for as-applied challenges is beyond a reasonable doubt). The Court concludes that the burden of proof is beyond a reasonable doubt.

rise to a constitutional level. *Caperton*, 556 U.S. at 876 (citing *FTC v. Cement Institute,* 333 U.S. 683, 702 (1948)).

The Due Process Clause of the Colorado Constitution protects people from a deprivation of "life, liberty or property, without due process of law." COLO. CONST. art. II, § 25. The fundamental protections of neutrality and fairness provided by the Due Process Clause apply to decision-makers acting in quasi-judicial capacities. *City of Manassa*, 235 P.3d at 1057; *Scott*, 672 P.2d at 227. It's a longstanding principle that a fundamentally fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). That requirement of fairness and neutrality "in adjudicative proceedings entitles a person to an impartial and disinterested decision-maker." *City of Manassa*, 235 P.3d at 1056.

In *City of Manassa*, the Colorado Supreme Court adopted the test under *Caperton*. Under that test, the decision-maker must recuse him or herself when "a direct, personal, substantial, pecuniary interest" exists in a case before that decision-maker. *Caperton*, 556 U.S. at 876. Thus, the decision-maker cannot have an interest in the outcome based on the circumstances and relationships involved. *See In re Murchison*, 349 U.S. at 136.

Yet, it's not necessary for the Court to determine whether the decision-maker is *in fact* influenced by those circumstances or relationships; instead, due process requires an objective inquiry into whether under all the circumstances "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Caperton*, 556 U.S. at 879, 885 (citing *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)). Thus, the Court "asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881.

"The ultimate due process question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the

practice must be forbidden if the guarantee of due process is to be adequately implemented." *City of Manassa*, 235 P.3d at 1057 (internal quotations omitted) (citing *Caperton*, 556 U.S. at 129).

A serious risk of actual bias occurs, based on objective and reasonable perceptions, when a person with a personal stake in the case has a significant and disproportionate influence in placing the judge on the case by raising funds when the case is pending or imminent. *Caperton*, 556 U.S. at 884. Several factors go into this inquiry in the election context. "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* But the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case are also critical. *Id.* at 886 ("It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice").

The Court concludes that the undisputed material evidence establishes beyond a reasonable doubt that Commissioner Donnelly's failure to recuse himself in Coulson's application posed a serious risk of actual bias or prejudgment and that Thompson has shown a due-process violation, entitling it to judgment as a matter of law.[10] Several reasons support that conclusion.

First, the undisputed material evidence shows that Coulson's campaign contributions objectively had a significant and disproportionate influence on Commissioner Donnelly's re-election,

[10] The Court declines to wade into the actual-bias waters. *See Caperton*, 556 U.S. at 882. It's undisputed that Commissioner Donnelly conducted his own determination of whether he had an impermissible conflict and, subjectively, he found none. (It's unclear whether, in reaching that determination, Commissioner Donnelly considered his "uncontested loyalty" to the county citizens.) Moreover, the parties agree that no evidence presented demonstrates actual bias on the part of Commissioner Donnelly. Thompson Resp. at 13; Board Mtn at 20–21; Coulson Reply at 6. Instead, the question before the Court is an *objective* one: would an average commissioner in Commissioner Donnelly's position likely have been neutral or did the commissioner's participation in and vote on Coulson's application presented *an unconstitutional risk of actual bias*? *Caperton*, 556 U.S. at 881.

placing him in a position to vote on the USR application of his largest donors' company. *See id.* at 884. In August and September of 2016, the Coulsons, who own Coulson, contributed a total of $10,000.00 to Commissioner Donnelly's re-election campaign. Those contributions amounted to 18.6% of Commissioner Donnelly's $53,580.00 total new election contributions in the 2016 election cycle, and 17.7% of the total amount his committee spent on his bid for re-election. The Coulsons' contributions, *by themselves*, allowed Commissioner Donnelly to raise more than half of the total funds raised by his opponent in the 2016 election.[11] While it's undisputed that Commissioner Donnelly had other large contributions, including a combined donation of $7,500 and several others of $5,000 per family, none of those individuals (or entities) had a matter "pending or imminent" before the Board. *See Caperton*, 556 U.S. at 884. Coulson was the only entity that did have such a matter.

Second, the temporal relationship between the Coulsons' campaign contributions in 2012 and 2016, Commissioner Donnelly's 2016 election, and the status of the application all support a conclusion of a serious risk of actual bias or prejudgment. *Id.* at 886 ("It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice"). It's undisputed that Coulson didn't actively pursue its refiled USR application between 2010 and 2015.[12] Coulson's first communication in almost six years with the Larimer

[11] Commissioner Donnelly's opponent was Karen Stockley, who received campaign contributions totaling $19,027.10.

[12] During that time period, Coulson completed a noise study in 2015 and a flood plain analysis in the fall of 2016. Vol. I at 433. Ken Coulson admitted that because of the "recession in 2008, [Coulson] decided they had adequate reserves and had other pits that they were mining at the time" and that "[t]he permitting process started back up in 2015 with new analyses and reports." Vol. I at 434 (Peter Wayland noted that a noise study was conducted in 2015, consistent with Ken Coulson's statement). Considering the evidence in favor of Coulson, *People ex rel S.N.*, 329 P.3d at 282, the only evidence is that the application was dormant from 2010 and 2015, and that the application was pursued in earnest following the status update which coincided with their campaign contributions to Commissioner Donnelly.

County Planning Department was in September 2016, when it submitted a status update to the county. Vol. I at 390–92. At about the same time—in August and September of 2016—the Coulsons jointly contributed $10,000.00 to Commissioner Donnelly's re-election bid. Vol. I at 300, 303. Commissioner Donnelly ultimately won reelection in November 2016. Thus, it was reasonably foreseeable, at the time the Coulsons made their respective contributions, that the renewed application would come before the Board, and Commissioner Donnelly in particular, should he win reelection. Indeed, within 18 months from date of the Coulsons' contributions, Commissioner Donnelly provided the deciding vote to approve the application.[13]

Third, the Coulsons' campaign contributions and their timing in making them, created an objective and reasonable perception of bias by seeking to ensure that Commissioner Donnelly remain as a decision maker the USR application. *See Caperton*, 556 U.S. at 884. Several undisputed facts show that objective and reasonable perception. For one, Commissioner Donnelly knew Coulson well, having performed surveying work for the company for nearly six years. And, between the Coulsons' 2012 election contributions and the 2016 election contributions to Commissioner Donnelly, there was a *10-fold increase* in those contributions ($1,000 in 2012 and $10,000 in 2016). Temporally, the one material difference is that at a time that Coulson didn't actively pursue its application with the county, the Coulsons contributed $1,000 ($500 each) to Commissioner Donnelly's campaign. But for the 2016 election, when Coulson sought a hearing before the Planning Commission (a pre-requisite before the application going to the Board), the Coulsons together donated $10,000 to Commissioner Donnelly.

[13] The Board contends that this characterization is inaccurate because the order of voting is mere happenstance. The Court rejects the Board's facetious attempt to hide the obvious. Commissioner Donnelly's vote was the "deciding" vote not because of the order in which he voted, but because the USR permit wouldn't have been granted but for Commissioner Donnelly's vote. Code § 2-67(7) (suggesting that Board decisions require majority vote).

Fourth, the Coulsons' influence on the election, given all circumstances, would offer a temptation to the average commissioner not to "hold the balance nice, clear, and true." *See Caperton*, 556 U.S. at 885. While the Court need not divine whether the Coulsons' contributions were a necessary and sufficient cause of Commissioner Donnelly's victory, it's undisputed that Commissioner Donnelly won, receiving 99,191 votes compared with 80,647 votes for his opponent Karen Stockley.

Commissioner Donnelly was the incumbent entering the 2016 election cycle. But as he acknowledged, "my [2012] reelection race was very close and I need[ed] to run a strong campaign to win again." Ans. Rog No. 1. Thus, re-election was not assured, and it was essential for Commissioner Donnelly to obtain more support. Indeed, Commissioner Donnelly raised well over twice the amount of Karen Stockley, and he won the 2016 election for County Commissioner by 10 percentage points—55.16% (99,191 votes for Donnelly) to 44.84% (80,647 votes for Karen Stockley). Considering Coulson's proportionally large contribution, the timing of that contribution in relation to the election, and the relatively close margin of victory the Court finds that the totality of the circumstances demonstrates a significant and disproportionate effect on re-electing Commissioner Donnelly.

Fifth, important policy considerations support campaign-contribution limits in local elections, and those considerations align with the Court's conclusion here. *See City of Manassa*, 235 P.3d at 1055 ("conflict of interest" is a term of art "reflecting a host of different policy determinations, depending on the context in which it operates"). In particular, the Colorado General Assembly recently passed, and the Governor signed, HB19-1007 which creates campaign-contribution limits of $1,250 for certain county-wide elections. Previously, no campaign-contribution limits existed for county elections. HB19-1007 (revising Colo. Rev. Stat. § 1-45-103.7; and adding Colo. Rev. Stat. § 30-10-113). One of the chief concerns the bill sought to address was

contributions in county commissioner elections. Representative Emily Sirota, the sponsor of the bill, stated that it's "probably unwise that we don't have any limits … in our county races," and that "we regularly see contributions of $5,000 dollars, and many examples of extremely large contributions, in particular, in our county commissioner races in the amounts of $10,000, $30,000, even $40,000."[14] House Chambers Discussion of HB 19-1007 (Feb. 14, 2019) at 1:26:57. Thus, the purpose of the bill was to preserve integrity of electoral process, keep candidates accountable, and avoid the appearance of quid pro quo or impropriety. *Id.* Those are salutary goals.

In sum, given the Coulson's significant and disproportionate influence in Commissioner Donnelly's re-election and the temporal relationship between those contributions, the election, and the pending application, the average commissioner would have been tempted "not to hold the balance nice, clear and true." *Caperton*, 556 U.S. at 885.

Coulson presses several points in opposition to Thompson's motion, but none of them has merit. Initially, it contends that the standard in *Caperton* was only met there because (1) the $3 million donations exceeded the judge's total other campaign contributions by 300%; (2) the $3 million exceeded by $1 million both candidates' campaigns combined; and (3) the donations helped unseat an incumbent in a close election and place a new judge on the court just before it heard the donor's appeal." Coulson Mtn. at 18. But that argument misstates the holding in *Caperton*, which isn't limited to its facts. Indeed, *Caperton* didn't set a specific dollar figure or percentage to reach, or require that the campaign contributions result in the ousting of an incumbent, in order to establish a due-process violation. Instead, each of the facts that Coulson presents were *relevant* in establishing that an

[14] Moreover, an earlier version of the bill was introduced in 2017, HB17-1260 passed the house, but was suspended indefinitely in the Senate's State, Veterans, & Military Affairs Committee. At the Committee hearing, the concern of very large contributions to county commissioners was cited as a primary concern, which could create "an appearance of quid pro quo corruption."

objective conflict of interest existed and weren't meant to be *sine qua non* requirements in other cases. *Caperton*, 556 U.S. at 886.

Coulson also points the Court to several cases that distinguish the circumstances in *Caperton* and attempt to establish a baseline in Colorado. The Court finds these cases distinguishable from the circumstances here for several reasons. For one, in *City of Manassa* the Colorado Supreme Court found that a decision-maker receiving 25% of his income from the insurer of one of the parties didn't amount to an exceptional circumstance creating an unconstitutional risk of bias. *City of Manassa*, 235 P.3d at 1052–53. But while *City of Manassa* effectively ties *Caperton* to Colorado law, the specific circumstances in that case are distinguishable.

In *City of Manassa*, a non-elected licensed physician bound by separate regulatory and professional requirements, was hired by Pinnacol to render independent medical examination opinions in workers' compensation cases. *Id.* at 1053. The Supreme Court concluded that the physician didn't have an objective conflict of interest in large part because highly restrictive safeguards existed with which the physician had to comply. *See id.* at 1053–54. Those safeguards included a rule of procedure in workers' compensation cases that "prohibits a physician from evaluating a claimant if there is even the appearance of a conflict of interest." *Id.* at 1054. And that rule contained multiple guidelines to determine whether a conflict or the appearance of a conflict of interest existed. *Id.* at 1054 n.3. Those guidelines are analogous to the Code of Judicial Conduct's disqualification provisions. *Compare* C.J.C.R. 2.11(A) and comments, *with* Div. of Workers' Compensation R. of P. 11–2(H).

By contrast, here no such safeguards exist to protect against an objective conflict of interest by a commissioner. As the Court noted above, Code § 2-67(10) has constitutionally bare minimum requirements and offers little, if any, guidance to determine whether a commissioner has a conflict of interest.

The Court also rejects Coulson's contention that its application wasn't "pending or imminent" because it didn't resolve the referral agency and planning department issues until November 2017 and it wasn't before the Board at the time of the Coulsons' campaign contributions. *Caperton* itself rejects Coulson's overly narrow construction. All that's required is a *reasonable foreseeability* that the case will end up before the decision maker. In *Caperton*, the state supreme court didn't hear the case until November 2007, *almost three years* after Blankenship made his contributions that resulted in the unconstitutional risk of bias. *See Caperton*, 556 U.S. at 872 (Blankenship made his contributions in the 2004 judicial elections, after the initial jury verdict but before filing the appeal). Thus, merely because the case is not set for a hearing before the Board, it doesn't mean the case was not pending or imminent. Moreover, even when necessary pre-requisites haven't been met—such as the filing of an appeal—the case may still be pending or imminent when it is reasonably foreseeable that it will be heard by the decision-maker. *Id.* at 886.

Here, Coulson's application was pending or imminent because it was reasonably foreseeable that the Board, and Commissioner Donnelly in particular, would eventually hear it at the time the Coulsons made their 2016 election contribution. Based on Coulson's own status update in September 2016, it requested that a hearing be scheduled with the Planning Commission because most of the preliminary work or studies to get the matter before that commission had been completed. Vol I. at 390–92; Vol. I at 433. The parties agree that once the USR applicant resolves referral agency and Planning Department comments, the case proceeds to a hearing before the Planning Commission which, regardless of whether it recommends approval or denial of the application, forwards the application to the Board. Thus, at the time of the Coulsons' campaign contributions, Coulson actively pursued its application, which was in the middle of a process whose natural and reasonably foreseeable conclusion would be a vote by a commissioner whose re-election the Coulsons helped secure. *Caperton*, 556 U.S. at 886 ("Although there is no allegation of a quid pro

quo agreement, the fact remains that [the donor's] extraordinary contributions were made at a time when he had a vested stake in the outcome [of the election].").

Indeed, as noted above, between the 2012 to the 2016 election cycle, the Coulsons' contributions dramatically increased. In the 2012 election, it was 3.15% of Commissioner Donnelly's total new contributions, while in the 2016 election it was 18.66%. That represents an almost 500% increase in the percentage the Coulsons gave in proportion to Commissioner Donnelly's total campaign contributions. It's undisputed that Commissioner Donnelly knew of the contributions by the time he voted in favor of the application at the February 26, 2018, hearing. Board Rog. at 5 ("On February 26, 2018, I … voted to approve Coulson's USR application. I did not believe that I had a conflict of interest … *simply because Coulsons had supported my campaign*." (emphasis added)). Thus, given the timing of the contributions in the lifetime of the application, it was reasonably foreseeable that Commissioner Donnelly would vote on Coulson's application.

Coulson also contends that its First Amendment rights would be infringed if Commissioner Donnelly were disqualified merely because he received campaign contributions. That argument misses the mark, the applicable legal standard, and the Court's holding above. The Supreme Court has stated that, "[s]pending large sums of money in connection with elections, *but not in connection with an effort to control the exercise of an officeholder's official duties*, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 208 (2014) (emphasis added) (citing *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 359 (2010)). While it's generally impermissible to restrict campaign contributions, the government has a legitimate interest in restricting such contributions when they're made "in connection with an effort to control the exercise of an officeholder's official duties." *Id.*

But, "ay, there's the rub," to quote the Dane. William Shakespeare, *Hamlet* act 3, sc. 1. Because the Court determined that the Coulsons' contributions had a significant and disproportionate impact on placing Commissioner Donnelly in a position where he'd vote on Coulson's application, it thus created a significant risk of bias in violation of Thompson's due-process rights. *Caperton*, 556 U.S. at 884. That is, in the parlance of *McCutcheon*, the Coulsons spent "large sums of money in connection with an effort to control the exercise of an officeholder's official duties." 572 U.S. at 208. And the First Amendment doesn't protect such conduct.

Coulson also points to California and Hawaii Supreme Court decisions for the principle that the mere receipt of funds for a political campaign doesn't create a conflict of interest, and that to hold otherwise infringes upon the First Amendment. *See Woodland Hills Residents Assn., Inc. v. City Council*, 609 P.2d 1029, 1032–33 (Cal. 1980); *see also Life of the Land, Inc. v. City Council of City & Cty. of Honolulu*, 606 P.2d 866, 902 (Haw. 1980). The Court finds those decisions generally inapposite, but notes that much like *McCutcheon*, the California Supreme Court acknowledged campaign contributions can serve as grounds for disqualification when the evidence shows bribery or a *conflict of interest*. *Woodland Hills Residents Assn., Inc.*, 609 P.2d at 1032 ("*Absent a showing of bribery or conflict of interest*, the law does not render it improper for members of (the council) to vote on projects of developers who have given campaign contributions to committees controlled by those members" (emphasis added)). As our Supreme Court noted, the term "conflict of interest" is a term of art "reflecting a host of different policy determinations, depending on the context in which it operates." *City of Manassa*, 235 P.3d at 1055. Thus, the Court perceives no First Amendment concerns in its ruling.

Accordingly, the Court concludes that Thompson's due-process rights were violated when Code § 2-67(10) as-applied under the circumstances failed to protect Thompson from Commissioner Donnelly's objective serious risk of bias.

The Court's decision in no way prevents Coulson or the Coulsons from making campaign contributions to their preferred political candidate. They may continue to do so, consistent with the applicable campaign-contribution limits. But when their chosen candidate—who is generally a legislator (making laws)—acts as a quasi-judge (making adjudicative decisions), the Due Process Clause requires that candidate to be "an impartial and disinterested decision-maker," free of bias and a conflict of interest. *City of Manassa*, 235 P.3d at 1056. Indeed, no party may "choose[] the judge in his own cause." *Caperton*, 556 U.S. at 886.

## IV. Conclusion.

For the reasons set forth above, the Board's motion for summary judgment is granted as to Thompson's facial attacks on §§ 2-67(10) and 4.5.3 of the Code. Judgment shall enter in the Board's favor and against Thompson on these claims.

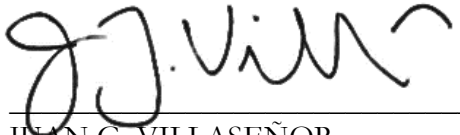
The Board and Coulson's motion for summary judgment, however, is denied as to Thompson's Rule 57 as-applied due-process challenge. Thompson's motion seeking judgment as to that claim is granted and judgment shall enter in Thompson's favor. The Court concludes that because Commissioner Donnelly participated in both the hearing and discussions related to Coulson's application, that participation violated Thompson's due-process rights to an impartial decision-making body.

Accordingly, the Board's decision approving Coulson's application is vacated and this matter is remanded to the Board to hold the hearing on Coulson's application again. Commissioner Donnelly will be recused from participating in any part of that hearing or decision-making process under Code § 2-67(10).[15]

[15] The Court's decision to remand is a final judgment. *Scott*, 672 P.2d at 226 (citing *Cline v. City of Boulder*, 532 P.2d 770 (Colo. App. 1975)).

**SO ORDERED** on August 12, 2019.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge